

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1100 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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JADHID @ BHAYALI AHMEDBHAI KHIYANI

Versus

COMMISSIONER OF POLICE

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Appearance:

MS DR KACHHAVAH for Petitioner

MR UR BHATT ADDL.GOVERNMENT PLEADER for Respondents

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CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/05/98

ORAL JUDGEMENT

By this petition, under Article 226 of the Constitution of India, the petitioner who is the detenu, calls in question the legality and validity of the order of detention passed by the Commissioner of Police, for the city of Rajkot passed on 15th November, 1997, invoking his powers under Section 3(2) of the Prevention

of Anti-Social Activities Act (hereinafter referred to as "the Act"), pursuant to which the petitioner has been arrested and at present kept under detention.

2. The facts in brief leading the present petitioner to prefer this application may be stated. The Commissioner of Police, after studying the papers and assessing informations, he was having, found that before the Pradumannagar Police Station at Rajkot, about four complaints were registered against the petitioner. As alleged in one complaint, the petitioner committed the offences punishable under Secs. 143, 147, 148, 224, 225, 332, 341, 504, 506(2) of I.P.Code and Sec. 37(1) and 135 of the Bombay Police Act using the stick he had. In another complaint, as alleged, he voluntarily caused hurt by using Soda Bottle & knife and committed the offences punishable under Secs. 324, 323, 504, 506(2), 114 and 427 of I.P.Code. What is alleged in the third complaint is that using the knife, an iron pipe and wooden log, the petitioner had committed the offence of murder and also attempted to commit the murder and caused hurt to different persons and thereby committed the offences punishable under Sec. 302, 307, 324, 143, 147, 148 read with Sec. 149 of I.P.Code. As alleged in the last complaint, by throwing bricks and using the sword, the petitioner endangered the safety of the people and wrongfully restrained some of the people intimidated them & caused mischief and thereby committed the offences punishable under Secs. 341, 337, 336, 506, 504 of I.P.Code and Sec. 135 of the Bombay Police Act. When in such succession, the offences were being committed, the Police Commissioner thought it fit to have the inquiry in details. He preferred to record the statements of the witnesses or other persons, but no one was willing to come forward and make the statement against the petitioner, because of the fear of violence endangering his safety. After considerable persuasion, some of the persons showed their willingness to give the statement, and that too when the assurance was given that their particulars disclosing their identity would be kept secret. Studying those statements, the Police Commissioner found that subversive activities disturbing public order were going berserk. It was necessary to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, but under general law falling short and sounding dull, it was not possible to curb the activities. He, therefore, thought it fit to pass the impugned order in question. The order was then passed, consequent upon which the petitioner is arrested and at present is kept

under detention.

3. While challenging the order, the petitioner has raised several grounds, but, at the time of hearing, the learned advocate representing the petitioner confined to the only point namely exercise of privilege under Section 9(2) of the Act, going to the root of the case. Both the parties, therefore, submitted on that point. I will, therefore, confine to that point only.

4. Before I proceed, it would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from some constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and

should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, w/o Ibrahim Abdul Rahim Alla Vs. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, the authority passing the detention order has to satisfy the Court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. It is also necessary to show that the authority applied his mind to all the relevant factors emerging on record. It is pertinent to note that in this case, no such affidavit is filed. It can, therefore, be said that without any just cause, the privilege is exercised. Reading the order, it appears that entrusting the task of inquiry whether the fear expressed by the witnesses was genuine or honest or imaginary or an empty excuse to the subordinate officer, the detaining authority mechanically accepted whatever the subordinate officer reported in that behalf, because the detaining authority was having full faith and trust in the subordinate officer. He assumed that everything must be in order and honestly reported. On such assumption, when the report is accepted which is not legally permissible, it can be said that without any application of mind, the privilege is exercised, and therefore, subjective satisfaction is vitiated. In short, about non-disclosure and exercise of privilege, the cause justifying the same is not made out.

The petitioner, under the circumstances, was entitled to have those particulars so as to make effective representation and point out to the authority how those statements were not reliable. He was deprived of that right and when his right to make effective representation is thus jeopardised, continued detention must be held to be unconstitutional & illegal.

6. For the aforesaid reasons, this petition is allowed. The order of detention passed on 15th November 1998, by the Police Commissioner for the city of Rajkot is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule accordingly made absolute.

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(ccs)